SUPREME COURT, U. S.

No. 73-1761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

DISTRIGAS CORPORATION
DISTRIGAS OF NEW YORK CORPORATION
DISTRIGAS OF MASSACHUSETTS CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Distrigas Corporation, Distrigas of New York Corporation and Distrigas of Massachusetts Corporation (hereinafter "Distrigas" or "petitioners"), petition for a writ of ceritorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-19a) is not yet reported. The order of the Federal Power Commission issued May 25, 1973 (App. B, *infra*,

pp. 20a-27a) and its order denying rehearing issued June 20, 1973 (App. C, *infra*, pp. 28a-63a) are reported at 49 FPC —— and ——, respectively. Federal Power Commission Opinion Nos. 613 and 613-A are reported at 47 FPC 752 and 1465, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does Section 3 of the Natural Gas Act authorize the Federal Power Commission to exercise the regulatory authority conferred under Section 7 of the Act with respect to matters which have been excluded from the Commission's jurisdiction by Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b)?

2. Did the Federal Power Commission orders issued May 25, 1973 and June 20, 1973 illegally revoke a prior final and non-appealable order, i.e., Opinion No. 613, in which the Commission held that it did not have jurisdiction under Section 7(c) of the Act with regard to Distrigas's construction and operation of its Massachusetts and New York liquefied natural gas (LNG) terminals and its sales of LNG in those states?

STATUTES INVOLVED

Sections 1, 2, 3 and 7(c), 7(e) and 19(b) of the Natural Gas Act, 15 U.S.C. 717, 717a, 717b and 717f(c), 717f(e) and 717r(b) are set forth in Appendix D, *infra*, pp. 64a-69a.

STATEMENT

A. The Original Distrigas Project

This case involves the first Commission decision concerning the long-term importation of LNG from a foreign source. In 1970, Distrigas applied to the Commission for authority under Section 3 of the Natural Gas Act (15 U.S.C. 717b) to import up to fourteen (14) shiploads of LNG per year for 20 years from Algeria.[1] The application disclosed that this LNG would be received at terminals to be constructed at Everett, Massachusetts and Staten Island, New York and that the LNG would be sold to numerous gas distribution utility customers operating in those and other Northeastern and Mid-Atlantic states. Without waiving the right to contest any assertion of jurisdiction by the Commission under Section 7 of the Act (15 U.S.C. 717f), or otherwise, Distrigas also requested in its application "the issuance of any disclaimer of jurisdiction or order deemed necessary by the Commission to assure that Distrigas would be able to proceed to fulfill its contractual commitments to supply LNG to its customers at the time specified in those commitments."

After due notice, formal, public hearings on Distrigas's application were held during December 1970 before one of the Commission's hearing examiners (now Administrative Law Judge). In June 1971, the presiding examiner issued his initial decision recommending that Distrigas, subject to certain conditions, be authorized to import LNG as requested (47 FPC 797). The presiding examiner also found that Distrigas had met the required burden of proof under Section 7 of the Act; accordingly, he recommended that a certificate of public convenience

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[1] Each shipload would consist of 300,000 barrels of LNG which is the liquid equivalent of approximately 1.1 billion cubic feet of natural gas. Natural gas becomes a liquid at approximately atmospheric pressure when its temperature is reduced to —259 degrees F.

and necessity be issued authorizing the proposed sales in interstate commerce of LNG for resale (47 FPC at 844). Various exceptions to the presiding examiner's decision were filed.

B. Opinion Nos. 613 and 613-A

On March 9, 1972, the Commission, in a three-to-two decision,[2] issued its Opinion No. 613 (47 FPC 752; App. C, pp. 42a-60a) entitled, "Opinion and Order Granting Authorization to Import Liquefied Natural Gas (LNG)." That opinion affirmed the presiding examiner's approval of the project.

The Commission also affirmed the presiding examiner's determinations that: (1) LNG is natural gas as that term is defined in Section 2(5) of the Natural Gas Act (15 U.S.C. 717a(5)); (2) that to the extent Distrigas proposed to transport natural gas by barge or to sell natural gas in interstate commerce for resale, it was a natural gas company;[3] and (3) that with respect to the importation of natural gas, the decision of the District of Columbia Circuit in *Border Pipe Line Company* v. *F.P.C.*, 84 U.S. App. D.C. 142, 171 F.2d 149 (1948) was controlling, and accordingly, the importation of natural gas is not in "interstate commerce" as that term is defined in Section 2(7) of the Act (15 U.S.C. 717a(7)) (47 FPC at 756, 759; App. C, pp. 44a-45a; 49a).

The Commission held that foreign commerce ceased upon the delivery of the LNG to the Everett and Staten

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[2] The majority consisted of Commissioners Brooke, Carver and Walker; the minority of Chairman Nassikas and Commissioner Moody. The composition of the Commission has significance in this case. See pp. 7-9, *infra*.

[3] In Opinion No. 613 the Commission noted that its jurisdiction over the transportation of LNG by barge was a matter being considered by the Commission in Docket No. R-377, notice of which was issued on January 15, 1970 (47 FPC at 756; App. C, p. 45a). On May 4, 1973, the Commission dismissed Docket No. R-377, holding *inter alia*, that it had no jurisdiction under the Act over the interstate transportation of LNG by barge (49 FPC ——).

Island storage and terminal facilities (47 FPC at 758-759; App. C, p. 49a). The Commission also held that its jurisdiction under Section 7 of the Act attached at the tailgate of the LNG storage tanks with respect to that portion of the LNG or natural gas to be sold in intertsate commerce for resale. It expressly affirmed the presiding examiner's finding "that storage of this LNG, the regasification of this LNG, the sale of either the liquid or regasified LNG in the state of importation and the facilities and activities related thereto are neither in foreign or [sic] interstate commerce and are therefore outside of our jurisdiction" (47 FPC at 760; App. C, p. 51a-52a).

The Public Service Commission of the State of New York (PSCNY) and The Superior Oil Company sought rehearing which was denied by the same three-to-two vote in Opinion No. 613-A (47 FPC 1465). PSCNY sought timely judicial review of Opinion Nos. 613 and 613-A in the United States Court of Appeals for the District of Columbia Circuit (Case No. 72-1588). Pursuant to its own motion, PSCNY's petition for review was dismissed on January 10, 1973. Opinion No. 613 thus became a final, non-appealable order within the purview of Section 19(b) of the Act, 15 U.S.C. 717r(b).

Distrigas, in reliance upon Opinion No. 613, entered into long term contracts for the sale of imported LNG with various gas distribution companies and proceeded with construction of its LNG terminals.[4] Distrigas also

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[4] Construction of the terminal at Everett, Massachusetts had been completed in November 1972 at a total cost of approximately 30 million dollars ($30,000,000). The terminal contains two large cryogenic storage tanks of 600,000 and 374,000 barrel capacity, respectively; three vaporization, odorization and air stabilization systems; send-out facilities for vaporized gas, a small laboratory and office building; and a pier for unloading cryogenic oceangoing vessels and for loading cryogenic barges. The terminal occupies a site on the Mystic River in Boston Harbor and is already

entered into new contracts for the purchase of additional quantities of LNG. In late 1972 and early 1973, it filed further applications requesting Commission authorization to import additional quantities of LNG from Algeria to Staten Island and Everett. During this same period, additional applications were also filed by various of the petitioners with the Commission requesting Section 7 certificate authorization to transport regasified LNG in interstate commerce and to sell in interstate commerce for resale the imported LNG covered by both the original and later import applications.[5]

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in operation in accordance with Opinion No. 613. Six shiploads of LNG have been received at this terminal.

At the present time, construction continues on the Staten Island terminal. The terminal is located near Rossville and will include two 900,000 barrel cryogenic storage tanks, four vaporization, odorization and air stabilization systems, and marine loading and unloading facilities. Construction of the first tank and loading and unloading facilities were completed in January 1974; the entire terminal, including the second tank, is scheduled for completion by the end of 1974. Total cost is estimated to be well over 100 million dollars ($100,000,000).

[5] The additional import applications were filed in Docket Nos. CP73-78 and CP73-132. The Section 7 certificate applications were filed in Docket Nos. CP73-135, CP73-148, CP73-205 and CP73-230.

Distrigas and the other petitioners herein are subsidiaries of Eastern Energy Corporation, a wholly owned subsidiary of Cabot Corporation. Distrigas continues to be the importer of LNG. Distrigas of New York Corporation (DONY) is now the owner and operator of the Staten Island, New York terminal facilities. Distrigas of Massachusetts (DOMAC) is now the owner and operator of the terminal facilities in Everett, Massachusetts. Another affiliate, Distrigas Pipeline Corporation, proposes to construct and operate a short pipeline under the Arthur Kill between Staten Island and Woodbridge, New Jersey for the purpose of delivering regasified LNG to customers in that state. The applications now pending before the Commission reflect these corporate changes.

Following oral argument in the court of appeals, petitioners filed further applications *under protest* requesting Section 7(c) certificate authorization for the construction and operation of their LNG storage and regasification facilities in Docket Nos. CP74-122 and CP74-137.

Petitioners made repeated and urgent pleas for prompt and expeditious consideration and disposition of all of their pending applications. Despite these pleas, the Commission refused to set the applications for hearing. Instead, the Commission issued its order of May 25, 1973, the first of the two orders now under review.

C. The Orders of May 25 and June 20, 1973

By a vote of two to one (Commissioners Carver and Walker having resigned and having not yet been replaced) and without notice of any kind, the Commission by its order issued May 25, 1973, abruptly reversed its jurisdictional determination with respect to Distrigas's terminal facilities in Opinion Nos. 613 and 613-A. The order held that the Commission had jurisdiction under Section 7 of the Act over the construction and operation of the Everett and Staten Island terminals and it directed Distrigas to file applications for authorization to construct and operate, as appropriate, such facilities (App. B, pp. 20a-23a).

The Commission majority, which as of May 25, 1973 consisted of Chairman Nassikas and Commissioner Moody, the dissenters in Opinion Nos. 613 and 613-A, based its order upon a theory of "changed circumstances." It claimed that the Distrigas applications, specifically those filed subsequent to the issuance of Opinion No. 613, indicated that the complexion of the entire Distrigas import project had been significantly altered from one that was basically intrastate in character to one that was interstate in nature. The two-member majority asserted that the Commission had Section 7 jurisdiction over the terminals because the terminals at Everett and Staten Island were ". . . to be used for the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale. . . ." (App. B, p. 22a). Commissioner Brooke dissented. He pointed out that Distrigas, in its first application, had proposed

to make interstate sales as well as intrastate sales of LNG and that the Commission's theory of "changed circumstances" was inconsistent with the facts of record (App. B, pp. 24a-25a).

By order issued June 20, 1973, the Commission denied Distrigas's timely application for rehearing (App. C, pp. 28a-36a). Abandoning the theory of "changed circumstances," the two-member majority in this order reverted to the position it had asserted as respects jurisdiction when it was the minority in Opinion No. 613, i.e., that the statutory definition of "interstate commerce" in Section 2(7) of the Act (15 U.S.C. 717a(7)) encompasses the importation of LNG and that any facilities used for the importation of LNG are used in interstate commerce and therefore require Section 7 certificate authorization (App. C, p. 33a). Furthermore, the majority held that Section 7 certificate authorization is also required to make any sales for resale or transportation of LNG either within or outside the state of importation (App. C, p. 34a).[6] In making this determination, the two-member majority of the Commission interpreted "interstate commerce," as that term is defined in the Natural Gas Act to include foreign commerce, an interpretation which the Commission majority in Opinion No. 613 had, in reliance on the District of Columbia Circuit's decision in *Border*, specifically rejected. In fact, the present majority stated that:

> "to the extent the *Border* decision could compel a contrary result, that holding is in error." (Footnotes omitted) (App. C, p. 32a)

In its June 20 order, the Commission acknowledged "that Distrigas had made substantial investment in re-

[6] The majority contended that there were at least two legal theories which could form the basis of a uniform jurisdictional policy with respect to LNG imports: "interstate commerce" and "commingling," both arising from Section 7 of the Act. In the order of June 20, the "commingling" theory was rejected (App. C. pp. 31a; 34a).

liance upon Opinion Nos. 613 and 613-A" and indicated that it was "not unmindful of the problems and equities association with application of a change of policy," but the majority determined that the opinion it had expressed as the minority in Opinion No. 613 was now to be given full force (App. C, pp. 34a-35a).

Commissioner Brooke, again vigorously dissented, finding the order of June 20, 1973 ". . . a gross injustice and a denial of due process. . . ." He disagreed with the majority's analysis of "interstate commerce," which, as noted, would render the facilities of any LNG import project subject to Section 7 jurisdiction, regardless of the future destination of the gas or for what purpose the gas would ultimately be used (App. C, pp. 37a-41a).

The orders of May 25 and June 20, 1973 have been stayed by appropriate orders of the Commission and the court below.

D. The Opinion of the Court of Appeals

The court rejected the Commission's arguments in defense of its concept of "interstate commerce" and refused to overrule its prior decision in *Border*, *supra*. Hence, the court found that the Commission's orders of May 25, 1973 and June 20, 1973 were not properly supported (App. A, pp. 13a; 18a).

The court also rejected Distrigas's contention that *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), which forbids retroactive revocation of a prior final agency order, should be given controlling weight. The court distinguished *Seatrain* on the ground that, unlike the statute involved in that case, Section 3 of the Act expressly authorized the Commission to issue the kind of orders it did on May 25 and June 20, 1973, provided that opportunity is given for the hearing required under that section (App. A, p. 16a).

The court remanded the record to the Commission for supplementation pursuant to the provisions of Section 3 of the Act (App. A, p. 19a).

REASONS FOR GRANTING THE WRIT

The decision of the court below has significance because it concerns a series of orders arising out of the first proposal presented to the Commission for the long term importation of LNG from a foreign source. The Commission, in Opinion No. 613, expressly recognized the importance and indeed the necessity for numerous large scale importations of LNG as a means of supplementing our nation's dwindling domestic supplies of natural gas.[7] Each LNG import proposal will require massive capital expenditures for the construction of natural gas production, gathering and liquefaction facilities in the country of origin and for the construction of receiving terminals and regasification facilities in the importing country, as well as for the construction of specially designed cryogenic tankers for the transportation of LNG on the high seas. The decision below forbodes serious practical consequences for persons contemplating the importation of LNG to supplement existing supplies of natural gas. If there is a possibility that an import authorization can be revoked retroactively, potential importers may be reluctant to commit the capital required for the importation of LNG.

This case also involves issues of national importance in the administration of the Act. Section 3 of the Act has never been reviewed by this Court. The case presents

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[7] In Opinion No. 613, the Commission also discusses in detail the decline in proven natural gas reserves, the decline in daily production capacity, the necessity for curtailment of sales by various interstate natural gas pipelines and the Commission's anticipation of even more severe shortages in the future (47 FPC 761-764; App. C, pp. 52a-57a).

for the first time the question of whether the conditioning authority of Section 3 can be used to impose Section 7 certificate jurisdiction over intrastate sales and operations over which the Commission has been expressly denied jurisdiction by Section 1(b) of the Act. Indeed, the question here is not simply whether such authority can be exercised *in futuro* but whether such authority can be imposed *retroactively* upon sales commenced and facilities placed in operation in accordance with a solemn holding that they were not subject to Commission jurisdiction. The decision below is not only inconsistent with the provisions of the Act, particularly Section 1(b), but it is contrary to the teaching of this Court in *Seatrain* and seriously erodes the doctrine of finality of agency orders. Review by this Court is, therefore, urgently needed.

1. While the court below disagreed with the Commission on the proper basis for its assertion of jurisdiction over the construction and operation of the Distrigas terminals and intrastate sales of imported LNG, it ultimately decided that federal regulatory authority should be asserted. In remanding the case the court below erroneously held that the Commission could condition an import authorization under Section 3 so as to supplant state regulatory authority over intrastate facilities and intrastate sales of imported LNG, if the Commission found that comprehensive federal regulation was "necessary and appropriate" to the public interest.[8] The court simply

[8] As dictum, the court below observed that "At the same time, nothing in this opinion precludes the Commission on remand, from reverting to the commingling theory, rather than turning to Section 3, if it does so in a manner that allows responsible judicial review." (App. A, p. 19a). The dictum is wholly inconsistent with the court's recognition that this Court's decision in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943) (App. A, p. 19a) prevents an affirmance of the Commission's order on the basis of the commingling theory because the Commission itself rejected that theory in the order of June 20, 1973.

The court's comment regarding "commingling" in this dictum is also inconsistent with its refusal to reverse its earlier decision

ignored Section 1(b) of the Act which specifically excludes intrastate sales and operations from the Commission's regulatory jurisdiction under the Act.

The court's interpretation of the Commission's "conditioning" power under Section 3 must be rejected as inconsistent with the plan of regulation adopted by Congress in enacting the Natural Gas Act. In Section 1(a), Congress first declared the necessity for regulation of transportation and sales "in interstate and foreign commerce." It then provided one section applicable to imports and exports of natural gas from or to a foreign country and in other sections provided regulatory measures applicable to interstate commerce. The legislative history of the Act demonstrates that Congress intended to make a clear distinction between the Commission's authority over foreign commerce under Section 3 and its regulatory jurisdiction over interstate commerce under other sections of the Act. Foreign commerce was specifically included in the definition of "interstate commerce" in Title III of the Rayburn bill H.R. 5423, 74th Congress, 1st Session, the bill which was the original legislative foundation for the Natural Gas Act; but "foreign commerce" was excluded from that definition in the statute as it was finally enacted.[9] The legislative history does not show a Congressional intent that Section 3 could be used by the Commission to override the limitations placed on its jurisdiction by Section 1(b).

The court below acknowledged that the purpose to be achieved by Commission regulation under the Act was

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in *Border, supra*, which held that foreign commerce was separate from and not a part of interstate commerce. The "commingling" theory is essentially the same as the interstate commerce theory. Commingling results when jurisdictional interstate natural gas from one source is mixed with non-jurisdictional intrastate gas from another source in a jurisdictional facility.

[9] A concise description of this legislative history is set forth in *Border, supra*, 171 F.2d at 150-151.

broadly complementary to that reserved to the states so there would be "no gaps" for private interests to subvert the public welfare. The court went on to say, however, that the Commission's authority under Section 3 with respect to imported LNG was sufficiently elastic that it could assert its regulatory jurisdiction and authority under other sections of the Act to supplant state regulation if the Commission, in effect, found that regulation in a particular state was ineffective. The Congress plainly did not give the Commission such wide discretion. As the legislative history demonstrates, the Natural Gas Act and the Federal Power Act were enacted by Congress primarily to fill the regulatory gap arising under the decisions in this Court in *Public Utility Commission of Rhode Island* v. *Attleboro Steam and Electric Company*, 273 U.S. 83 (1927) and *State of Missouri, ex. rel., Barrett* v. *Kansas Natural Gas Company*, 265 U.S. 298 (1924); those statutes were not enacted to invade the area of intrastate activities where states are fully competent to regulate.[10]

2. The court erred in dismissing petitioners' primary contention that the teaching of *Seatrain* is controlling upon the disposition of this case. *Seatrain* is based upon

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[10] See Report No. 709, Committee on Interstate and Foreign Commerce, House of Representatives, and Report No. 1162, Committee on Interstate Commerce, U.S. Senate, 75th Congress, 1st Session on H.R. 6586 (1937), the bill that became the Natural Gas Act.

When Section 7 of the Act was amended in 1942, the intention of Congress to refrain from vesting the Commission with any authority over intrastate matters was restated. See Report No. 1290, Committee on Interstate and Foreign Commerce, House of Representatives, 77th Congress, 1st Session on H.R. 5249 (1941).

Moreover, when Section 1(c) was added to the Act in 1954, Congress again reaffirmed its original intent that the Act was to supplement and not supplant state regulation. See Report No. 899, Committee on Interstate and Foreign Commerce, House of Representatives, and Senate Report No. 817, Committee on Interstate and Foreign Commerce, U.S. Senate, 83rd Congress, 1st Session on H.R. 5976 (1953).

the principle of finality of agency orders. It forbids retroactive revocation of the terms of a prior final agency order in whole or in part except as specifically authorized by Congress. The teaching of *Seatrain* is so intimately related to the doctrine of fairness under our constitutional system that any departure from *Seatrain* in this case would also constitute a deprivation of property without due process of law in contravention of the Fifth Amendment.

The court rejected *Seatrain's* applicability on two grounds: first, it found that the Commission can revoke retroactively a right vested in petitioners by Opinion No. 613, provided it gives petitioners an opportunity for hearing and upon a showing of good cause. The court holds that such a power stems from the Commission's authority under Section 3 to issue permits for the exportation or importation of natural gas "upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." Second, the court interprets the text of Opinion No. 613 at 47 FPC 764-765 (App. C, pp. 57a-58a) as a warning to Distrigas that its jurisdictional decision was tentative only, and might be changed should the Commission determine, in the future, that the public interest so required (App. A, p. 16a).

Petitioners do not dispute that the Commission has broad powers under Section 3 to attach conditions to import and export permits and to issue, under the statutory conditions specified, supplemental orders revising an authorization previously granted. But the power to revoke an authorization retroactively, in whole or in part, is not specifically stated in the statute and such an arbitrary power cannot properly be inferred. The only logical interpretation that can be placed on Section 3 is

that Congress authorized the Commission to act only prospectively in attaching conditions or in making supplemental orders. Moreover, there can be no doubt that the Commission in Opinion No. 613 specifically noted that it might change its regulatory policies in the future and that it might, if necessary, issue a supplemental order regarding the import authorization granted to Distrigas in Opinion No. 613, but the text of that opinion cannot properly or fairly be constructed as a warning that the Commission might in the future reverse its authorization retroactively.

In short, the court below condones a serious abuse of the administrative process. If the decision is not reversed, petitioners will be unlawfully deprived of their rights and property contrary to the teaching of this Court in *Seatrain* and in contravention of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is respectively submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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